IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 183.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY

vs.

LINDA Y. SPRATLEY.

Reply to Brief for Plaintiff in Error on the Merits of the Case.

One of the Federal questions relied on by plaintiff in error is stated in its brief as follows:

"While plaintiff in error was doing business in the State of Tennessee, from 1870 to 1894, it strictly complied with the statutory laws of the State, and especially with the requirement and condition of section 12 of the act of March 22, 1875, which is entitled 'An act to regulate the business of life insurance in the State of Tennessee.' It was claimed that the compliance with this condition of the law and the execution of the power of attorney authorizing the secretary of the State to acknowledge service of process (which power

of attorney should be irrevocable, 'even though the company should retire from the State or be excluded therefrom') constituted a contract between the company and the State to the effect that the former should be brought into the courts of the State through the secretary of state as its attorney-in-fact, and that the subsequent act of 1887, subjecting it to suit by service of process on any agent, 'no matter what character of agent such person may be,' so that it might be sued by service of process on some person who was not in any sense its representative, impaired the obligation of the contract and violated section 10 of article 1 of the Constitution of the United States."

See page 7 of brief of plaintiff in error.

Now, it must appear in the record in direct and positive terms or by necessary intendment that the Federal question relied on was raised and decided in the court below, in order to bring the case within the twenty-fifth section of the judiciary act.

Furman *vs.* Nichol, 8 Wall., 44.
Crowell *vs.* Randall, 10 Pet., 368.
Armstrong *vs.* Treasurer, etc., 16 Pet., 281.
Beer Co. *vs.* Mass., 97 U. S., 25.

The record in a chancery case consists of the pleadings and decrees. The Federal question stated above does not appear in the record of this case, either in direct or positive terms or by necessary intendment.

If it were true that a compliance by plaintiff in error with section 12 of the act of March 22, 1875, and the execution of the power of attorney thereunder constituted a contract between it and the State of Tennessee (which we deny),

it should have been made to appear somewhere in the pleadings of the plaintiff in error, either in direct terms or by necessary intendment, that it had complied with said section and had executed and delivered such power of attorney. Nothing of the kind appears either in the bill of the plaintiff in error or elsewhere in the record in this case. It appears only in the proof.

In Tennessee the decree must conform to the case made in the bill, and if based alone on the proof it is void.

Cunningham *vs.* Wood, 4 Hum., 417.
Scott *vs.* Fowlkes, 12 Heisk., 700.
Furman *vs.* North, 4 Bax., 296.
Merriman *vs.* Lacefield, 4 Heisk., 209.

It thus results that the supreme court of Tennessee in this particular case was without jurisdiction to determine said Federal question.

The opinion of the State supreme court and the certificate of the presiding judge is not conclusive on this question.

Leeper *vs.* Texas, 139 U. S., 462.

The plaintiff in error states the contract feature of its case as follows:

"The act itself prescribes and proposes to foreign life insurance companies the terms and conditions upon which they will be licensed to carry on business within the State of Tennessee. The State proposes to issue its licenses if the companies will pay a certain tax and comply with certain other conditions, one of which is to place themselves within the jurisdiction of the State courts by the execution of a

power of attorney appointing the secretary of state their agent for the service of legal process. No insurance company was in any manner bound by this act (and no company could obtain the privilege proposed) without a compliance with its terms and conditions. When its terms were accepted and complied with by any life insurance company, reciprocal rights and obligations were conferred on or assumed both by the State and the company. The State thereby became bound by *contract* to issue the license and protect the company in the enjoyment of the privileges prescribed. If it should permit itself to be sued, the State would doubtless be liable to an action for a violation of its obligation to issue the license or to protect the company in the enjoyment of its privilege of doing business in the State. The complying company not only becomes liable to pay the tax as a *consideration* for the privilege of doing business, but as a *further consideration*, by the execution of the power of attorney it becomes liable to the process of the State courts" (pages 20 and 21, brief of plaintiff in error).

Now, if this arrangement between a life insurance company and the State of Tennessee under said act of 1875 constitutes a contract, then the contract feature embraces all the terms and conditions prescribed in said act. Indeed, the plaintiff in error insists that when a company complies with the terms of the statute the State becomes bound by contract to issue the license, and if it should permit itself to be sued it would be liable for an action for violation of its obligation to issue the license.

On the theory of plaintiff in error, the question arises,

When does this contract end? Can it be determined in any other way than by consent of the two parties to it?

The act itself contains no terms of limitation and does not prescribe any time within which the contract shall terminate, if it be a contract.

The plaintiff in error insists (see page 23 of its brief) that upon the execution of the power of attorney nothing further remained to be done by it, and its rights under the act were vested, and that the repeal of the act did not affect these perfected rights or the power of attorney itself. In other words, plaintiff in error here contends that the State is powerless to change the agent designated in the power of attorney to accept service for it.

If the State cannot make such change, then can it change any other term or condition prescribed in the act?

Could it require a different tax to be paid or different reports to be made? Could the State refuse to renew a license? Plaintiff in error says not.

The logical conclusion of the position taken by plaintiff in error is, that the State is bound to allow all life insurance companies who have complied with the act of 1875 to do business within its borders, upon the terms prescribed in said act, as long as they choose, no matter what changes it it may make in its policy on this general subject. Certainly such a result could not be tolerated.

But when plaintiff in error comes to criticise the opinion of the supreme court of Tennessee on the point now under consideration, it admits that if the office of secretary of state were abolished, then service upon any general agent which it might have in the State of Tennessee would be valid (page 25 of its brief).

But if plaintiff in error has a contract with the State by which the secretary of state was the exclusive or only agent upon which service could be had in order to bind it, how could the State, by a subsequent law, alter that contract so as to make service on some other agent valid and legal?

If the State has such power, as we contend it has, then it has power to provide for the additional service prescribed in the act of 1887.

Plaintiff in error cites several cases for the position that the method of acquiring jurisdiction prescribed by the statute and the power of attorney is exclusive.

The first case is Oakland *vs.* Ins. Co., 69 Md. Reps., 248. In this case it appears that in 1868 the legislature of Maryland passed a statute providing for service of process on the agents of all foreign corporations. Then, in 1878, an act was passed embracing the whole subject-matter of regulating the business of foreign insurance companies and the service of process on their agents in the State of Maryland. The court held that this last act was exclusive as to foreign insurance companies.

In the case at bar, the supreme court of Tennessee has decided that the plaintiff in error was amenable to the operation of both the act of 1887 and the act of 1875. This is not a Federal question, and the decision of the supreme court of the State is conclusive upon it.

Plaintiff in error admits (see pages 4 and 5 of its brief) that "the decision of the State supreme court, that a proper construction of the act of 1887 embraced this case, is not and cannot be controverted here."

The next three cases are Liblong *vs.* Kansas Fire Ins. Co.,

82 Pa. St., 413; Thayer *vs.* Tyler, 10 Gray, 164, and Tusten *vs.* Eastland, 89 Mo., 13.

All these cases involved the construction of but one statute—that is to say, the several States in which they were decided had but one statute prescribing the form of service upon foreign insurance companies. The several cases respectively hold that the provisions of such statutes must be substantially complied with. The question of one statute being exclusive of another, where two existed, did not arise.

Other cases are cited by plaintiff in error as to the character of agent upon whom service can be had.

One is Phillips *vs.* Ins. Co., 62 Iowa, 633.

In this case it appeared that the Iowa code was as follows:

Section 1165 required life insurance companies to appoint an attorney or agent in each county of the State in *which the company had an agency.* Section 2613 provided that as to all corporations, except municipal corporations, service might be made on any trustee or officer thereof, or any agent employed in the general management of its business, or on any one of the known or acting officers of the corporation.

Section 2613 provided that when any company, corporation, or individual had, for the transaction of business, an agency in any county other than that in which the principal resided, service might be had on that agent in suits growing out of the business of that office or agency.

The service was had in said case on one Hambleton, as assistant manager of agencies and general agent of the defendant insurance company, and it was made in Keokuk, in

the county of Lee. It appeared, further, first, that the defendant was a foreign insurance company, and that it had only one agent in Iowa designated under the statute, and he was located in the city of Des Moines; second, that Hambleton, when service was had, was in Keokuk representing the defendant company in a case before a justice of the peace; that he was assistant manager of the company and acted for the company when sent out to investigate losses, look up testimony, and look after local agencies, but that he and those filling his place never acted in States *where the company had an agent or agents appointed under State statutes.*

The court held that the service on Hambleton could not be sustained under section 1165, because he was not employed in any office or agency of defendant in Iowa and was not appointed an agent under said section, and that it could not be sustained under section 2612, because he had no authority to act for the defendant in Iowa at all and was not the general manager of its business in that State as contemplated by said section.

It will thus be seen that under section 1165 a foreign insurance company was only bound to designate agents in those counties in which it had an agency; and it will be further seen that the defendant company had no agency in Lee county and only one agency in the State, which was located in Des Moines, where an agent was legally and regularly appointed under the statute.

Of course, then, the service on Hambleton could not be sustained by this section, nor could it be sustained by the other section for the reason given by the court, that he did not represent the company at all in the State of Iowa.

The case therefore has no application to the case at bar.

In the case of Farmers' Ins. Co. *vs.* Higgsmith, 44 Iowa, 344, it was held that an agent to solicit and forward risks from that State could be served with process. If so, why, then, cannot an agent to investigate and settle losses so be served?

The case of Mulhearn *vs.* Press Co., 53 N. J. Law, 150, is a case construing the statute of New Jersey regulating the manner of service upon foreign corporations. The terms of the statute are not given or explained anywhere in the case. Inasmuch as we have not access to this statute, it is impossible for us to tell what the case really decides.

The case of The Equitable Life Ins. Co. *vs.* Vogel, 76 Ala., 441, simply decides the well-established principle that a corporation has its domicile as to debts contracted by it in the State in which it is chartered, but may subject itself to suit in another suit by appointing an agent there upon whom, as a statutory condition to do business in said State, process may be legally served.

Maxwell *vs.* R. R. Co., 34 Fed. Rep., 286, was a suit instituted in the State of Michigan. The Michigan statute gave jurisdiction over foreign corporations only where *the cause of action arose within that State.* The court found that the cause of action in said case arose within the State of Kansas and not within the State of Michigan, and therefore there was no local law making the defendant corporation amenable to suit in the State of Michigan.

For this position it cited the opinion of Judge Jackson in The United States *vs.* Telephone Co., 29 Fed. Rep., 17.

On this general subject see Block *vs.* R. R. Co., 21 Fed. Rep., 529.

Plaintiff in error cites Osburn *vs.* Ins. Co., 51 Vt., 278.

The court in this cause sustains the Vermont statute requiring agents for service to be designated before foreign insurance companies can do business in that State.

It says the statute is for the protection of the citizens of that State. It does not hold that a compliance with the statute makes a contract between the State and the insurance company, but says that when a foreign insurance company enters into a contract in Vermont, with a citizen of that State, it consents to be served under the statute, *so far as said contract is concerned* (p. 282).

Plaintiff in error quotes what the supreme court of Tennessee says in this case in approval of a portion of the opinion of the court of appeals of New York, in the case of Earl *vs.* Terre Haute Car Manufacturing Co. (p. 41 of Record), and then adds that the supreme court of Tennessee seems to assume that the test of valid service of process is, whether the notice actually reaches the defendant; and insists that this leads to the doctrine that service of process on a defendant outside of the State in which the suit was brought is good.

It will be seen by examining the opinion of the supreme court of Tennessee in this case that the criticism thus passed on it by the plaintiff in error is wholly unwarranted.

The court in that portion of its opinion quoted by plaintiff in error was simply laying down the rule that the service required by State statutes like those now under consideration should be such as might reasonably be expected to give actual notice to the defendant. It recognized, as every court does, that service must be first upon some agent or representative of the foreign corporation within the State

where the suit is brought, for the reason that process from the tribunals of one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them.

Pennoyer *vs.* Neff, 95 U. S., 727.

But, having once provided for reasonable service on an agent within the State, it may well be further provided that notice or informations shall be directly sent to the home office of the foreign defendant. This is but in accord with natural justice.

The case of Tripp *vs.* Railroad Co., 144 U. S., 127, is a case where it was attempted to serve a citation of a writ of error from the Supreme Court of the United States to the supreme court of a State by depositing a copy of the same in the post-office, addressed to the attorney of the defendant in error at his usual abode. The court held that the statute of the United States regulating practice in writs of error provided for personal service alone, and hence that the attempted service was void. It has no application to the case at bar.

The case of Fitzgerald *vs.* Fitzgerald, 137 U. S., page 98, simply holds that when a foreign corporation is not doing business in the State and has no officer there actually transacting business and representing it, it cannot be said that it is within the State so that service can be made upon it.

The case of Scott *vs.* McNeal, 154 U. S., 34, decides the single question that a probate court has no jurisdiction to appoint an administrator on the estate of a living person.

All through the brief of plaintiff in error runs the theory that statutes of the kind under discussion must designate

some agent of foreign corporations who represents them in reference to their litigation, and this on the idea that notice to the agent in order to bind the principal must be within the scope of the agent's authority. (See pages 12 and 15 of brief of plaintiff in error.)

But the principles are not analogous. Any actual or real agent of a foreign corporation may be designated for service of process. Thus, most of the statutes provide that where no other agent can be found within the State, then service may be had upon the person who last represented the company therein. Provisions of this kind have always been upheld.

This court *In re* Hohorst held that it was a sufficient service upon a foreign steamship company, which had within the district no officer and no agent expressly authorized to accept service, to serve it upon its financial agent, at his office, the same being the office at which the financial affairs of the company in this country were transacted, and this although the docks of the company where its steamships landed and took on and discharged cargoes, and its office for the transaction of matters connected with its actual industrial operations in this country, were in another district.

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